



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2001 Assembly Bill 360

**Assembly Substitute
Amendment 3**

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BACKGROUND

If a child is born with a disability or birth defect which developed prior to the time of birth, and a person could have informed the parents about the birth defect or disability prior to the time of the child's birth, that person may be liable for the costs of caring for that child or for the child's related medical expenses. The person could be liable for certain acts or omissions that occurred during the time that abortion was an available option, such as failing to inform the parents of the existence of, or results of, tests to detect the disability or incorrectly diagnosing the condition. If the child sues on her own behalf or through a guardian ad litem and alleges that as a result of the person's actions, the child was not aborted and was allowed to be born with a disability, the action is called a wrongful life action. If the parents sue on behalf of the child and claim that they suffer damages for expenses due to the care and treatment of the child with the disability, and the damages result from the child having been born with a disability rather than aborted, the action is called a wrongful birth action. In *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (S. Ct. Wisconsin 1975), the Wisconsin Supreme Court held that the right to sue for wrongful life **is not recognized in** Wisconsin. The court stated, however, that the right to sue for wrongful birth is recognized in Wisconsin.

2001 Assembly Bill 360 was introduced on April 30, 2001 by Representative Kedzie and others; cosponsored by Senator Fitzgerald and others. The bill was referred to the Assembly Committee on Family Law, which held a public hearing on the bill on December 6, 2001.

Assembly Bill 360 creates an immunity from liability for a person's act or omission that resulted in the birth of a child because the woman did not undergo an abortion that she would have undergone had the person not committed the act or failed to commit the act.

ASSEMBLY SUBSTITUTE AMENDMENT 3

Assembly Substitute Amendment 3 to 2001 Assembly Bill 360 was offered by Representative Kedzie on January 16, 2002. Assembly Substitute Amendment 3 contains the following provisions:

- The substitute amendment defines “wrongful birth action” and “wrongful life action.” Under the substitute amendment, a “wrongful birth action” means a cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, seeks economic or noneconomic damages resulting from a condition of the child that existed at the time of the child’s birth and is based on a claim that a person’s act or omission contributed to the mother’s decision not to undergo an abortion. A “wrongful life action” means a cause of action that is brought by or on behalf of a child, seeks the child’s economic or noneconomic damages resulting from a condition of the child that existed at the time of the child’s birth and is based on a claim that a person’s act or omission contributed to the mother’s decision not to undergo an abortion.
- The substitute amendment specifies that no person may recover damages from another person resulting from any condition that existed at the time of the child’s birth, if that other person’s negligent act or omission contributed to the mother’s decision not to undergo an abortion.
- The substitute amendment provides that the damages must result from a condition that exists at the time of the child’s birth if it is based on a claim that the person’s *negligent* act or omission contributed to the mother’s decision not to undergo an abortion. Therefore, the substitute amendment would not prevent recovery of damages from another person for a person’s intentional acts or omissions that may have contributed to the mother’s decision not to undergo an abortion. Further, the substitute amendment does not eliminate other types of liability that might exist outside of damages in a wrongful birth action or a wrongful life action.

On January 17, 2002, the Assembly Committee on Family Law recommended adoption of Assembly Substitute Amendment 3 by a vote of Ayes, 5; Noes, 1; and recommended the bill for passage, as amended, by a vote of Ayes, 5; Noes, 1.

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